## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: June 9, 2000

TO : Sandra Dunbar, Regional Director

Region 3

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Wayne County Action Program, Inc. 530-6067-6001-3700

Case 3-CA-22359 530-6067-6067-

3400

530-6067-6067-5200 530-6067-6067-8150

This Section 8(a)(5) case was submitted for advice on whether the Employer unlawfully refused to provide requested information, including witness statements, over the proposed discharge of an employee for alleged sexual harassment, where the employee chose to voluntarily resign.

First regarding the requested information other than the witness statements, we conclude, in agreement with the Region, that the Employer unlawfully failed to provide this relevant information. Although the Employer asserted to the Region a defense of confidentiality under Detroit Edison<sup>1</sup>, the Employer offered only its bare assertion and failed to document how and the information was confidential. Bare assertions are insufficient to establish a legitimate and substantial business justification for not turning over relevant information.<sup>2</sup> In addition, in simply denying the Union's request for the witness statements without bargaining for an accommodation of the Union's interest, the Employer did not meet its obligations under Detroit Edison.

We note that the Employer asserted to the Union that provision of the requested information was moot because the employee almost immediately and voluntarily resigned. We also reject that defense because the Board will order the provision of requested information "despite the conclusion

<sup>&</sup>lt;sup>1</sup> Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979).

 $<sup>^{2}</sup>$  <u>U.S. Testing Co. v. NLRB</u>, 160 F.3d 14, 20-21 (D.C. Cir. 1998).

of the grievance procedure" for which the Union originally requested the information.<sup>3</sup>

Second regarding the witness statements, the General Counsel in Ormet Aluminum Mill Products Corp.,  $^4$  has urged the Board to abandon the Anheuser-Busch per se approach to prearbitration disclosure of witness statements, and instead to apply the Detroit Edison balancing test that the Board applies to all other categories of alleged confidential information.

Applying a <u>Detroit Edison</u> analysis here, the witness statements appear to be relevant. As noted above, the Employer has not offered any legitimate and substantial business justification for failing to turn over these witness statements, offering instead only its bare assertions that the statements are confidential. Moreover, even assuming, arguendo, that the Employer had established a reasonable and substantial business justification, it has not bargained with the Union about a reasonable, good faith accommodation in lieu of providing the actual witness statements.

Finally, we note that <u>Anheuser-Busch</u> involved a prearbitration request for witness statements, and there is no pending arbitration in this case. However, a pending arbitration is but one basis by which a union establishes the relevance of requested information. The Supreme Court in <u>NLRB v. Acme Industrial Co.</u>, 6 held that an employer has a general duty to furnish relevant information which is reasonably necessary to a union's performance of its responsibilities. "These responsibilities include the administration of the contract and the processing and evaluating of grievances. Thus, an employer is obligated to provide information requested for the purpose of handling grievances." The mere fact that there is no pending arbitration, or that the arbitration has concluded, 8 is not dispositive of the union's need for the information.

Bloomsburg Craftsmen, Inc., 276 NLRB 400 at note 1 (1985).

 $<sup>^4</sup>$  Case 8-CA-29061, Advice Memorandum dated September 5, 1997.

 $<sup>^{5}</sup>$  Anheuser-Busch, 237 NLRB 982 (1978).

<sup>6 385</sup> U.S. 432 (1967).

 $<sup>^{7}</sup>$  Clinchfield Coal Co., 275 NLRB 1384 (1985).

 $<sup>\</sup>square^8$  Bloomsburg Craftsmen, supra.

In this case, it is the Union's need to police its bargaining agreement and bargain with the employer, i.e., grieve the pending employee discipline with the Employer, which establishes relevance for the Union here.

Accordingly, the Region should issue complaint, absent

settlement, against the Employer's refusal to supply all the requested information.

B.J.K.